

Town of Amherst
Zoning Board of Appeals - Special Permit

DECISION

Applicant: Shaul Perry d/b/a Sunwood Builders
84 Potwine Lane, Amherst, MA 01002

Property Owner: Carl Matuszko
317 Meadow Street, Amherst, MA 01002

Date Application filed with the Town Clerk: October 11, 2005

Nature of request: Petitioner seeks a Special Permit, under Section 6.3 and Section 5.10 of the Zoning Bylaw, to create one new flag lot and to fill land.

Location: Summer Street and Ball Lane,
(Map 5A, Parcel 56, R-N/R-LD and FC Zones)

Legal notice: Published in the Daily Hampshire Gazette on October 26 and November 2, 2005, and sent to abutters on October 26, 2005.

Board members: Zina Tillona, Barbara Ford and Russ Frank

Submissions:

The applicants submitted the following documents:

Plans as follows:

- Preliminary Grading and Drainage Plan, dated October 4, 2005, and revised November 7, 2005.
- Property line plan showing common driveway easement, dated September 15, 2005, and revised November 8, 2005

Miscellaneous documents as follows:

- Letter and copy of a plan from the 1873 Atlas of Hampshire County from Don Miner dated December 21, 2005, responding to a plan submitted by Vincent O'Connor showing an accumulation of stones in the field, dated December 12, 2005.
- Letter from Don Miner dated February 2, 2006, authorizing the Zoning Board of Appeals to continue the public hearing process for this application.
- Draft Common Driveway Easement and Agreement for Lots 1, 2 and 3, undated.
- Draft Homeowners Association Agreement regarding ownership, agricultural restrictions and management of the common land, undated.
- A Quitclaim Deed for the property on Mill Street adjacent to the property under consideration, dated August 8, 1997, including an Agricultural Deed Restriction.
- A letter from Donald Miner to the Board, dated February 21, 2006, and attached cross sections describing the proposed houses, the proposed fill and requesting that a landscaping plan not be required.

Town staff submitted the following documents:

From the Planning Department:

- A Memorandum dated November 3, 2005, commenting on zoning, previous permits, Conservation Commission review, possible Farm Committee and Planning Board review and Phased Growth.
- An email dated January 4, 2006, from Jonathan Tucker, Planning Director, responding to a letter from Vince O'Connor dated January 3, 2006, (listed below)
- A Memorandum dated January 5, 2006, reviewing the record of the public hearing on November 10, 2005, and noting issues remaining to be addressed.
- A Memorandum dated January 30, 2006, commenting on options for the ownership and management of the remaining land and on the requirements for filling;
- Various maps from the Amherst GIS Browser illustrating property lines, zoning and topography on the property in question and on adjacent parcels.
- Special Permit ZBA FY86-36 issued to John H. Fitzgibbon on behalf of Carl T. and Theodore C. Matuszko to operate a dispatching, storage, maintenance and inspection center for large vehicles;
- An email from Christine Brestrup, Land Use Planner, dated February 22, 2006, informing the Board of upcoming deliberations by the Conservation Commission with regard to this project.

From the Assistant Fire Chief, Mike Zlogar:

- A Memorandum dated November 9, 2005, commenting on access, water supply and address assignments;

From the Town Engineer, Jason Skeels:

- A transmittal dated October 18, 2005, commenting on storm water runoff, common driveway easement, drainage easement, cleanouts and the need for a drain manhole;
- A letter dated November 10, 2005, commenting on drainage flowing towards the adjacent lot to the east, as well as sewer and water lines and a drainage easement;

Town Boards and Committees submitted the following documents:

- From the Conservation Commission, Order of Conditions numbered NOI05-0995, dated December 22, 2005, regarding the proposed work.
- From the Planning Board, a Memorandum dated November 10, 2005, commenting on the future use of the remaining open space, drainage, landscaping and the possible need for a structural analysis of proposed fills.
- From the Farm Committee, an email dated November 9, 2005, requesting an extension of the review and comment period for boards and committees.
- From the Farm Committee, a Memorandum dated January 10, 2006, commenting on the remaining land and ways to mitigate the impact of the proposed development on the agricultural resources of the town.

Members of the public submitted the following documents:

- A letter dated November 10, 2005, from Vincent J. O'Connor of 179 Summer Street, commenting on drainage, fill, height of proposed buildings and flag lot requirements.
- A plan showing the location of an unusual accumulation of stones in the field, dated December 12, 2005, submitted by Vincent O'Connor.

- A letter dated January 3, 2006 from Vincent J. O'Connor of 179 Summer Street, commenting on Section 3.3285 of the Zoning Bylaw, Farmland Conservation Development Standards and the size of flag lots in the FC zone.
- An email dated November 10, 2005, from Laura Doyle of 85 Mill Street, commenting on drainage, wetlands and filling.
- A letter dated March 23, 2006, from Vincent O'Connor commenting on the interpretation of the Zoning Bylaw by the Zoning Board of Appeals, specifically on Section 3.285, Farmland Conservation Development Standards, and recommending that the Board deny the application for the filling and for the flag lot.

The Zoning Board of Appeals submitted a letter to the Conservation Commission, dated February 7, 2006, regarding the proposed mowing of the remaining land.

Site Visit: November 8, 2005

At the site visit the Board was met by Shaul Perry and Don Miner of Sunwood Builders. The Board observed the following:

- The location of the property on a quiet residential street surrounded by a mixture of multi-family and single-family homes;
- The piles of fill material which have been deposited on the site in preparation for construction;
- The wetland area on the western and northern part of the site that was recently flagged; the flags were in place on the date of the site visit;
- The approximate locations of the proposed houses;
- The location of the proposed access strip for the flag lot;
- The wooded slope at the rear of the site leading to an upper field owned by Carl Matuszko.

Public Hearing: November 10, 2005.

At the public hearing Don Miner and Shaul Perry presented the petition. Mr. Miner made the following statements:

- The property consists of a 4.1 acre parcel carved out of a larger 30 acre parcel;
- The property has frontage on Summer Street.
- The applicant is requesting a Special Permit for a flag lot and filling of land.
- The property has split zoning; the first 150 back from Summer Street is zoned R-N (Neighborhood Residence); beyond that the zoning changes to R-LD (Residential Low Density) with an FC (Farmland Conservation) Overlay.
- The applicant is creating two frontage lots and one flag lot.
- The wetlands delineation has been approved by the Conservation Commission.
- There are wetlands buffer zone impacts on all three lots.
- A common driveway is proposed to serve all three lots.
- The applicant is proposing to raise the area where the houses will be built by placing up to 5 feet of fill.
- The houses are proposed to be moderately-priced homes with full basements.
- The water table is just a few feet down from existing grade.
- There is an intermittent stream along the west boundary of the site.
- A 16 inch culvert runs under Summer Street.
- The storm drainage from Summer Street runs onto the property being considered.
- The property is marginally suitable for farming since it is so wet.

- The applicant is planning to meet with the Farm Committee to hear comments about the proposed plan.
- Finished floor grade for the new homes will be approximately 1 foot higher than finished floor grade for the houses across the street.

Shaul Perry made the following comments:

- Test holes showed that the site has a high water table.
- By raising the grade around the houses, the basements can be built above the water table, and the foundations will be placed just above the high water table.
- There will be footing drains installed around the foundations to drain groundwater away from the houses; the inverts of these drains are based on the invert of the existing catch basin in Summer Street into which the site drainage system will flow.
- In New England, homebuyers prefer to buy homes with basements, not homes that are built on slabs.

Mr. Miner made the following comments:

- The proposed grading plan creates flat areas around the houses for lawns, play areas and gardens.
- The applicant intends that the remaining 2.6 acres of land that is not to be built upon will be retained as open space for use by the three homeowners.
- The intent is to have the open space owned by a Homeowners' Association.
- Raising the grade around the houses will prevent wet basements.
- The test pits were done in the spring, after it had rained.
- In October there was no standing water because the water had infiltrated into the soil, even though there had been a period of heavy rains around that time.

Mr. Perry noted that:

- Homeowners could rely on the use of a sump pump in the basements, if the basements were built closer to the water table, but a power outage or a pump failure could cause there to be flooding in the basements; a gravity-fed drainage system is better and more reliable.
- The high water table at the back of the lot may be only 18 inches below the existing grade.
- The floors of the basements will be a few inches above the high water table.

Barbara Ford asked whether the basement would be built within the fill and whether the basement walls would be hidden by the fill. The applicant agreed that the basements would be substantially hidden by the fill.

Russ Frank asked why it was necessary to place 5 feet of fill on the site. There was further discussion of the need to cover up the basement walls, to protect the foundations and to keep the basements dry.

The Board and the applicant discussed the difference in grades from existing street grade to the finished floor grade. They discussed the house across the street where there is a differential of about 2 feet between the grade of the site and the finished floor.

Ms. Ford asked about the house located to the east of the site. Mr. Miner stated that the house is 140 to 150 feet away, implying that it would not be affected by the proposed lots.

Mr. Miner made the following comments:

- The Town had placed fill along the road in this area to prevent storm drainage from sheet-flowing across the road.
- The water table on the site fluctuates over time.
- The wetland consultant who advised Sunwood Builders thought there was evidence that some areas of the site had been filled in the past.
- The owners of the property, the Matuszko's, had used their land as agricultural land.
- The Matuszko's proposed a total of 8 building lots on this parcel in the 1960's.

The Board asked the applicant to describe how the storm drainage on the site will be handled.

Mr. Perry stated that the foundation drains around the houses will be connected to a drain line that will flow under the driveway and will eventually connect with a catch basin in the street. Storm water that falls on the center and western parts of the site will flow across the surface of the lawns to the west and north, eventually flowing into the wetland area. Stormwater that falls on the eastern parts of the site will flow into a proposed swale along the eastern property line and eventually into a culvert that flows under the driveway.

Zina Tillona read the letter from the Town Engineer, Jason Skeels, dated November 10, 2005, which commented on the revised plans submitted by the applicant. This letter noted that there was a need for a swale along the eastern property line to direct stormwater away from the abutting property, that more information about the sewer and water lines was needed on the plans and that a drainage easement was needed across Lot 2, one of the frontage lots.

Bonnie Weeks, Building Commissioner, expressed concern about the possible storm drainage flowing onto abutting properties that was mentioned in Jason Skeels' letter. Mr. Miner explained that the grading plan shows a 2 foot grade change along the centerline of the proposed swale that runs along the eastern property line, from the rear of the property to the street. This swale will direct stormwater to flow to the culvert under the driveway and not onto the adjacent property to the east. He noted that the GIS maps show that the property to the east is higher than the property being considered under this application, so water will not flow onto the abutting property. The swale, which will be lower than the grades on both properties, will carry the water away.

Mr. Perry noted that the culvert that runs under the driveway has been sized to accommodate the flow from this swale. Maintenance of this culvert will be included in the common driveway maintenance agreement.

Mr. Frank asked about the concerns expressed in the Memorandum from the Planning Board, dated November 10, 2005, particularly the concern about the structural stability of the fill materials. He noted that issues related to the filling could be dealt with by imposing a condition on the Permit that would require that a structural engineer, the Building Commissioner or the Town Engineer review the filling. He also noted that the Conservation Commission was scheduled to review the proposed grading and drainage at their meeting on December 14, 2005.

Joseph Steig, of 99 Summer Street, stated that he owns the house across the street and that, while he is not opposed to development on the site, he has concerns about aesthetics and drainage. There has been significant flooding in the neighborhood. He is concerned that more impervious surfaces will produce more runoff that will flow down his driveway. The street at the west end of

the site has been flooded with as much as 6 to 8 inches of water. He stated that his own house is raised up and that the new houses will be 1 foot above his house.

Mr. Miner noted that the street level is about 6 feet lower than the proposed finished floor grades of the new homes. The grade of the ground around the houses will be about 2'-10" below the finished floor grade.

Lawrence Quigley of 35 Ball Lane commented on the remaining 2.6 acres of open space. He would like it to be maintained as it is, as an open field.

Vince O'Connor of 179 Summer Street made the following comments:

- Mr. Matuszko's land has been continuously farmed for more than 31 years (producing dairy silage corn); the upper terrace was also farmed.
- The farmer who has rented the land recently could rent from the new homeowners' association.
- The wetland area has also been farmed and has only become wet in the last few years.
- The Zoning Board should investigate what types of soils exist on the site and what is the quality of the farmland.
- The culvert across Summer Street is in good condition and works well; it is set above grade and has never had a flow problem.
- The culvert has the capacity to handle more water than it currently handles.
- The wetland area across the street is a conservation parcel owned by the Town of Amherst.
- The site sits adjacent to other tracts of farmland and conservation land.
- It would be useful for the applicant to produce a drawing (a cross section or elevation) showing what the neighbors will see from across the street.
- The storm drainage should not flow onto adjacent properties.
- There is too much fill being proposed.
- The Board should ask about the height of the proposed buildings with reference to existing surrounding grades and with respect to the height limitations in the Bylaw.
- The height of the buildings combined with the 5 foot fill should not exceed 35 feet.
- The flag lot may violate the provisions of the Farmland Conservation Bylaw.

In addition to his comments, Mr. O'Connor presented a letter to the Board dated November 10, 2005.

Russ Frank MOVED to continue the evidentiary portion of the public hearing to January 12, 2006, at 7:30 p.m. Barbara Ford SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing: January 12, 2006

At the continued public hearing, Don Miner presented the petition. He made the following comments:

- He and Shaul Perry had met with the Farm Committee; the Farm Committee had expressed its recommendations to the Zoning Board in a memorandum, dated January 10, 2006; Mr. Miner and Mr. Perry did not have any disagreements with the recommendations of the Farm Committee and are willing to comply with those recommendations;

- Mr. Miner and Mr. Perry met with the Conservation Commission; they will need to meet with them again to discuss the recommendations of the Farm Committee;
- The applicant had proposed placing an Agricultural Deed Restriction on the remaining property.
- Shaul Perry has a contract with the current land owner to purchase the land;
- He will form a Homeowners Association to care for the common driveway and the open space adjacent to the lots.

Christine Brestrup, Land Use Planner with the Planning Department, described the Farm Committee's recommendations, including:

- 1) That there should be access to the remaining land from Summer Street and from the rear of the parcel (the upper Matuszko land);
- 2) That ownership of the remaining land should be associated with one lot, not three.

Zina Tillona reiterated that the Farm Committee had recommended that only one of the lot owners, rather than all three, should own the open space, and that this implied that one lot owner would be required to purchase the open space and pay taxes on it.

Mr. Perry responded that he was willing to take ownership of the open space and to combine it with the flag lot if that is what the Board would like. He would allow access to the farmable area for farming; the farmland to the east could be joined with the farmable area on his property; there would be accessibility from Summer Street or from the adjacent flag lots to the east.

Mr. Miner noted that the remaining open space could be owned by a Homeowner's Association with one member, avoiding the problem of the lots eventually being combined by the Assessor, which has been the practice for tax purposes.

There was discussion about access to the farmable area of the remaining land. Ms. Brestrup noted that access could be provided across the common driveway and down the slope to the northwest, over Lot 3, the proposed flag lot.

Mr. Frank noted that the remaining land was not entirely un-farmable. A portion of the land to the north (approximately 1/3 acre) was upland area available for farming.

Mr. Miner noted that the draft agreements that had been submitted could be rewritten to remove reference to an Agricultural Deed Restriction, given the fact that so little of the remaining land could be farmed, due to its delineation as wetland.

The Board discussed the status of the adjacent lots to the east and whether they were currently being actively farmed. Shaul Perry noted that these lots were supposed to be mowed annually to keep them open.

Mr. Frank asked about the water table on the site and whether it was consistent across all three lots. Mr. Perry responded that the water table is approximately 4 feet below the existing grade and is level across the whole site, based on the soil logs.

Mr. Miner noted that the soil maps show that the entire area consists of Sudbury Fine Sandy Loam, which is known for wet soil conditions. He stated that the foundations for the new homes will be

placed about two feet below existing grade and that sub-drains will be installed around all of the foundations. He stated that the finished grades around the houses at the foundation walls will be about 7 feet above the water table. He noted that all fill will be placed outside of the structure and that the foundations will be placed on existing soils. The fill will act as backfill for the foundations.

Mr. Frank asked about the fill around the proposed homes. Mr. Perry noted that for a standard house, the excavations for the foundation footings are dug, then the footings and walls are poured and then the foundations are backfilled. He asserted that the amount of settling for the fill proposed for this project will not exceed the amount of settling normally experienced on a residential project.

Mr. Frank noted that if the water table is consistent across the site at 4 feet below existing grade then there is not much margin for error in placing the footings for the houses.

Mr. Perry noted that the wetland consultant had given the applicants the worst case information with regard to the water table and had told them where to place the foundations. He also noted that the builders were required to put in a footing drain.

Mr. Miner noted that the footing drain would be connected to the catch basin in the street. He also asserted that the old houses in the neighborhood did not seem to have significant drainage problems.

Mr. Frank asked about the potential for this project to cause drainage problems on the property to the east. Ms. Brestrup stated that the topography of the adjacent parcel to the east is higher than the property under consideration and that therefore storm water should not flow onto the adjacent parcels. Mr. Frank expressed concern that adding 5 feet of fill to the applicant's property would cause water to flow onto the property to the east.

Mr. Miner stated that the owner of the adjacent property had placed approximately 6 to 12 inches of fill along the property line. He stated that Mr. Perry would create a berm, using loam, along the property line to prevent water from flowing to the east. This berm could be planted and mowed.

There was discussion about the height of the proposed houses. Mr. Miner noted that, according to the Zoning Bylaw, the houses were not permitted to be more than 35 feet tall, from the finished grade at the outside of the houses [on the street side] to the peaks of the roofs.

Vince O'Connor of 179 Summer Street requested that the hearing be continued in order to resolve the issue of farming on the wetland areas of the remaining land. He noted that the parcel under consideration was the lowest parcel on the street and that there would be a negative impact on the visibility of the farmland if the fill were placed as proposed. He asked the Board to weigh the value of the proposed basements against the problems created by placing a large amount of fill on the site. He also stated that he was satisfied, after speaking with the Planning Director, that there had been no historic structure in the location where there was an unusual accumulation of stones in the field, as noted on a plan he submitted.

Mr. O'Connor asserted that the Zoning Bylaw, Section 3.285, (and especially Section 3.2855), clearly applies to flag lots and that the 150 foot buffer should prevent development on the proposed flag lot, notwithstanding the email from the Planning Director, Jonathan Tucker. He urged the Board to reject the application for the flag lot and the fill.

The Board discussed the need for the fill and its relationship to the desire for full basements. Mr. Perry noted that fill is needed to protect the proposed foundations but that the extent of the proposed fill is related to aesthetics, to blend the fill needed to protect the foundations into the surrounding landscape.

Mr. Perry noted that the fill also helps to hide the foundation walls. Only the bottom 4 feet of the foundation needs to be covered with earth, however the houses will look better if most of the foundation is covered. The houses could have a slab on grade with a crawl space rather than a basement, however the basements provide expansion space for the homeowners.

Mr. Frank noted that the expansion issue could be solved by building houses on slabs but making them wider [to provide more interior space].

Mr. Perry noted that all three houses would share the management of the driveway and that they could also share management of the remaining land.

Mr. Miner stated that the applicant was not proposing to pave the driveway with blacktop at this time.

The Board stated that it needed more time to read and absorb the information that had been submitted. They discussed continuing the hearing.

Barbara Ford MOVED to continue the evidentiary portion of the public hearing to February 2, 2006, at 7:30 p.m. Russ Frank SECONDED the motion. The Board VOTED unanimously to continue the public hearing.

Continued Public Hearing: February 2, 2006

Don Miner again presented the petition. He opened his remarks by responding to the memorandum from the Planning Department, dated January 30, 2006, that addressed the issues of the fate of the remaining land and the filling of land. He made the following comments:

- The applicant is looking to the Board for guidance about what to do with the "remaining land".
- The applicant is happy to do whatever the Board wishes, however he reminded the Board that the Conservation Commission has jurisdiction over the wetlands portion of the "remaining land" and so whatever is done must be in keeping with the Conservation Commission's requirements.
- The Building Commissioner can withhold occupancy permits if work is not done to the satisfaction of the Conservation Commission.
- The Conservation Commission will be monitoring work within the buffer zone.

Mr. Perry noted that a large portion of the buildable area on the site is within 100 feet of the wetland and that all drainage will flow through the wetland so the Conservation Commission will be keeping a close eye on the work.

The Board discussed whether a bond would be needed to ensure compliance with the plans and with Town of Amherst regulations, as provided for in Section 5.104 of the Zoning Bylaw. Ms. Tillona noted that a condition could be placed on the Special Permit, if it were to be granted, that would require compliance with all aspects of Section 5.10 of the Zoning Bylaw. Mr. Miner noted

that the wetlands consultant who filed the Notice of Intent would be preparing a written report to the Conservation Commission stating that all of the work was done according to the plans and the Order of Conditions issued by the Conservation Commission.

Bonnie Weeks, Building Commissioner, suggested that the Board could require that an engineer or surveyor monitor filling and grading and prepare a report and certification that the filling and grading work had been built in accordance with the approved plans. She suggested that the Certificate of Occupancy could be withheld pending receipt of such a report.

Ms. Ford expressed concern about the height of the roofs. The Board discussed the height of the proposed buildings noting that because the land was proposed to be filled up to 5 feet, the roof heights would be 5 feet higher, since the height measurement begins at the finished grade adjacent to the buildings, according to Section 6.19 of the Zoning Bylaw, [not at the grade of the road]. The overall height of the buildings is limited to 35 feet above the finished grade on the street side of the houses, according to Table 3 of the Zoning Bylaw, which means that the overall height of the houses from the grade of the road could be 40 feet.

Mr. Perry stated that the design of the houses was not yet determined and therefore he did not know how high the buildings would be.

The Board noted that they understood that the fill was proposed so that the basements would not be placed in the groundwater. Ms. Weeks and Ms. Brestrup stated that the reason this project required a Special Permit for filling is that it exceeded the limit of 5 feet of fill over a 2,000 square foot area or 2 feet over a 5,000 square foot area [10,000 cubic feet] as stated in Section 5.10 of the Zoning Bylaw. There was further discussion of the height of the fill relative to the height of the proposed houses.

Ms. Ford stated that the Board needed to resolve the following issues: 1) whether a single owner or three owners would be responsible for the remaining land and 2) how to access the remaining land and 3) whether farm vehicles would have access over the common driveway. The Board discussed with Mr. Perry that the access for the remaining land could be over the common driveway and Lot 3, the flag lot.

Barbara Ford MOVED to close the evidentiary portion of the public hearing. Russ Frank SECONDED the motion. The Board VOTED unanimously to close the evidentiary portion of the public hearing.

Public Meeting – Discussion

The Board discussed the application. Mr. Frank stated that he would like to divide the discussion and vote into two parts, the flag lot and the fill. He stated that he had been troubled by the language of the Zoning Bylaw with respect to the flag lot and its proximity to the FC zone. He was also troubled by the proximity of the flag lot to the wetlands. However, he was persuaded by Jonathan Tucker's email with respect to the Farmland Conservation Bylaw and he was satisfied that Section 3.285, and Section 3.2855 in particular, of the Zoning Bylaw related only to Cluster Development. Mr. Frank stated that he had resolved the issues that originally held him back from approving the flag lot.

Ms. Brestrup noted that there is enough frontage on the parcel as a whole to allow three frontage lots to be created. That is, it is not necessary to have a flag lot in order to develop this property to

accommodate three houses.

Ms. Tillona stated that the proposed houses might be an attractive solution for a less-than-attractive plot of land. Ms. Ford noted that the existing neighborhood is one of modest homes.

Mr. Frank stated that he was still troubled by the amount of fill and the creation of the mound. The Board discussed whether appropriate landscaping could ameliorate the look of the fill and the mound. Having previously acknowledged his understanding that Section 3.285 of the Bylaw, Farmland Conservation Development Standards, applies to Cluster Development only, Mr. Frank referred to Section 3.2857 which states that "Every reasonable effort shall be made to maintain views of open agricultural lands from nearby public ways." He stated that the fills would obscure views of the open land and that the houses did not need to have basements.

Ms. Ford noted that when the houses were built passersby would not be able to see the farmland, that the wetland areas could not be farmed and that the Matuszko farmland on the upper terrace is not visible from the road because of the rise in the topography and the existing trees. The view from the road will be of houses not of farmland.

Mr. Frank stated that he found the mounds to be visually offensive and that this ran counter to Section 10.38, specifically Sections 10.382 and 10.385, which refer to the creation of visually offensive structures or site features and the protection of adjacent properties from such structures or features.

Ms. Tillona noted that most people in this area expect a house to have a basement and that houses without basements are not as attractive as those with basements to potential buyers. She and Ms. Ford stated that if the grading is done in a "natural" way that it would be acceptable. Ms. Brestrup stated that the slopes will rise 1' for every 3' of horizontal run, a fairly gentle slope.

The Board discussed the merits of stone walls versus slopes to accommodate filling. The applicant noted that the filling would allow yards to be created for playing.

Ms. Weeks stated that a ranch house is usually about 16 to 17 feet high, a two-story home is about 25 feet high and a three-story home is about 34 feet high.

The Board discussed the proposed garages. Mr. Miner stated that the finished floor of the garages would be 2 feet below the finished floor of the houses.

The Board discussed whether they could permit the fill but at a different height. Mr. Frank noted that with less fill a full basement would not be possible. The Board discussed other places in town where fill had been placed such as Poets' Corner in East Amherst.

Ms. Tillona stated that she was inclined to approve the application with conditions. The Board discussed landscaping and noted that the Planning Board, in a memorandum dated November 10, 2005, had recommended that a landscape plan be submitted. The Board discussed ways that the mounds might be treated, including landscaping and gentle steps, to make them less obtrusive.

Mr. Frank stated that he was still troubled by the drainage issue. Mr. Miner reminded the Board that the applicant was willing to install an earthen berm along the property line to ensure that no storm drainage would move onto the adjacent property.

Ms. Tillona recommended that the applicant have another conversation with the Town Engineer, Jason Skeels, to resolve the drainage issues.

Ms. Ford returned the discussion to the fate of the remaining land. The Board discussed the issues of access, the comments of the Farm Committee, whether the land could be used for community gardens, who should own it and whether it should be kept open or allowed to succeed to forest.

Mr. Perry offered to go before the Conservation Commission to request permission to mow the remaining land. He stated that it seemed most beneficial to everyone to keep the land associated with one lot owner and to mow it to keep it open as the Farm Committee had recommended. The owner of the flag lot (Lot 3) would be buying the open space and along with it a certain quality of life and the responsibility to care for the land.

Ms. Ford suggested that a condition could be imposed that would require that the remaining land be mowed in perpetuity.

Mr. Frank stated that he might be able to agree to approve the application for filling if there were a satisfactory plan for landscaping and if the remaining land, including the wetland area, were mowed to keep it open. He would need assurance that the Conservation Commission agreed to allow mowing of the wetland area and buffer zone, preferably in perpetuity. Mr. Frank suggested that a condition be crafted to require this mowing and that the Special Permit be granted conditioned upon the approval of the Conservation Commission. The Board then discussed the fact that they have been cautioned by Town Counsel not to condition their approval on another Board or Commission's approval.

The Board then requested that Ms. Brestrup prepare a memorandum or letter from the Zoning Board to the Conservation Commission, summarizing the issues related to the importance of keeping the remaining land open and not allowing it to succeed to forest.

Without taking a vote on the application, the Board discussed some items that they believed they had agreed upon to date and asked staff to draft a list for their use at the continued public hearing.

The Board then discussed the need to reopen the evidentiary portion of the public hearing to allow it to receive further testimony with respect to the fate of the remaining land and with respect to comments by the Town Engineer on the grading and drainage plan.

Russ Frank MOVED to reopen the evidentiary portion of the public hearing. Barbara Ford SECONDED the motion. The Board VOTED unanimously to reopen the evidentiary portion of the public hearing.

Barbara Ford MOVED to continue the evidentiary portion of the public hearing to February 23, 2006, at 7:30 p.m. Zina Tillona SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing: February 23, 2006

Zina Tillona MOVED to continue the evidentiary portion of the public hearing to March 23, 2006, in order to resolve issues related to the fate of the remaining land with respect to wetlands and

agriculture. Russ Frank SECONDED the motion. The Board VOTED unanimously to continue the evidentiary portion of the public hearing.

Continued Public Hearing: March 23, 2006

At the continued public hearing Christine Brestrup, Land Use Planner, summarized for the record the contents of the Farm Committee memorandum dated March 20, 2006. The Board had received this memorandum via email on March 21, 2006, and had received a copy of the memorandum at the beginning of the continued public hearing. The memorandum contained the Farm Committee's recommendations with respect to the disposition of the remaining land as well as comments about whether development on farmland should be allowed.

Ms. Brestrup also gave a report about a meeting that had been held on March 8, 2006, with representatives of the Department of Environmental Protection, the Farm Committee, the Conservation Department and the Planning Department. The purpose of that meeting had been to discuss the issue of agricultural exemptions for farming in wetland areas. During that meeting the participants were told by representatives of DEP that farming can be allowed in delineated wetland areas under an agricultural exemption. An agricultural exemption can be granted as long as the land is farmed for income producing purposes and as long as the farming operations have not lapsed for a period of 5 years or more. In the case of this application farming had occurred as recently as the 2004 growing season, so the agricultural exemption that had allowed farming to occur there in the past is still in place.

Ms. Brestrup also summarized the issues that remained to be addressed by the Zoning Board of Appeals with respect to the fate of the remaining land, as follows: 1) Who will own it? 2) How will it be managed? 3) Where will the access be for the farmer who will lease the remaining land? In addition Ms. Brestrup reported on a message she had received from Town Engineer, Jason Skeels, stating that he had met with Mr. Perry and Mr. Miner on the site and had resolved the outstanding drainage issues.

Mr. Perry reported on the meeting with Jason Skeels mentioned above. Mr. Perry reported that Mr. Skeels had determined that the applicant's plan for grading and drainage was satisfactory. The drainage swale along the eastern property line is designed to be 2 feet lower at the road than it will be at its beginning. This swale will adequately prevent water from flowing onto the adjacent property.

Mr. Miner noted that the applicant would be placing fill along the property line to supplement the fill that was already there and that this fill would further prevent water from flowing eastward. The fill will be planted with grass, mowed and maintained.

Ms. Ford asked if the swale would be deep and large enough to hold the storm water that will be generated by the development. Mr. Perry noted that the adjacent property to the east is higher than the swale and so the water will flow into the swale. In addition, only a portion of the site will drain into this swale. Other portions of the site will drain by sheet flow over the land to the north and west, into the wetland.

Ms. Tillona noted that she thought that the Board had reached a consensus that the drainage plan was satisfactory. She suggested that the Board turn its attention to a discussion of the fill including the issue of whether the Board should require a bond, as suggested in Section 5.104 of the Zoning Bylaw.

Russ Frank inquired about the definition of the natural angle of repose. Ms. Brestrup responded that it depends on the material being placed but that many earth materials have a natural angle of repose of 1:1, which is equivalent to a 45 degree angle. She further commented that the slopes being proposed were 3:1, or 30 degrees, which is considerably less steep than the natural angle of repose of commonly used fill materials.

The Board discussed when the fill would be placed in terms of the sequence of construction for the site as a whole. Although much of the fill is already on the site in the form of small mounds, the foundations will need to be dug first, the foundation walls poured and then the foundations will be backfilled with the fills from the mounds as well as additional fill that will be brought onto the site. At that point the site fills can be spread and compacted to form the final shape of the land.

The Board discussed the height of the proposed buildings. Mr. Frank commented about the cross section that had been presented by Mr. Miner at a previous public hearing, which showed a house that was 22 feet high. He noted that the Zoning Bylaw did not allow buildings of more than 35 feet in height.

Ms. Brestrup commented that this height was measured from the finished grade on the front side of the building, facing the roadway, not from the grade of the roadway itself, although the Board could impose a condition that would limit the height to no more than 35 feet from the roadway elevation.

The Board discussed the need for an Agricultural Deed Restriction.

Vincent O'Connor of 179 Summer Street read a statement that he had prepared, which he later distributed to the Board in the form of a letter, dated March 23, 2006. He noted that the Board's decisions are not based on precedent and that the Board needs to interpret the Bylaw when it makes decisions. He stated that the Board should interpret the Bylaw as it is written. He further asserted that Section 3.285 does apply to any development within the Farmland Conservation District and that therefore the flag lot should not be permitted because it is within the 150 foot buffer from the FC District. He enumerated criteria in Section 10.38 of the Bylaw with which he believed the application did not comply. He asserted that the proposed filling did not comply with Section 10.38 and nor did it comply with the development standards contained in the Farmland Conservation Development Standards. He urged the Board to deny the application for filling and to order the applicant to remove the fill that had already been placed on the site in order to discourage these types of "fait accompli" activities.

The Board reviewed the email they had received from Planning Director, Jonathan Tucker, dated January 4, 2006, in which Mr. Tucker stated that Section 3.285 of the Zoning Bylaw, Farmland Conservation District, applies to cluster developments only and does not apply to every type of development within the FC district, with the exception of a limitation being placed on the size of flag lots within the FC district.

Russ Frank MOVED to close the evidentiary portion of the public hearing. Barbara Ford SECONDED the motion. The Board VOTED unanimously to close the evidentiary portion of the public hearing.

Public Meeting – Discussion

Russ Frank stated that the interpretation of Section 3.285, Farmland Conservation, had been addressed at the last hearing. The Bylaw had been in-artfully drafted and created ambiguity but he

was persuaded by a logical reading of the bylaw that it applies to cluster development and not to this application. He suggested that Section 3.285 should be redrafted.

Mr. Frank went on to say that he had had a problem with the proposed fill and had asked for landscape plans, but that Mr. Miner had explained why it was not reasonable to present landscape plans at this time. Mr. Frank stated that the cross section prepared by Mr. Miner had helped in his understanding of the proposed filling. He was still uncomfortable with the amount of fill that was being proposed but was being persuaded that it was palatable. He noted that there were special and unique circumstances regarding this parcel and that it was not a precedent for other parcels.

Ms. Tillona stated that if the permit were approved, landscape plans could be brought to the Board for approval at a later date.

Russ Frank stated that one of the things that had persuaded him that the filling might be approved was an understanding that the proposed fills would have a gentle slope, not a steep slope. He was also persuaded that the applicant had made efforts to accommodate farming on the remaining land.

Ms. Ford stated that she was concerned that the applicant had placed fill on the site before coming to the Board for approval. Mr. Frank concurred with Ms. Ford's concern. Ms. Brestrup noted that the applicant was not aware that a Special Permit was required for the filling until he attempted to file an application for a Special Permit for the flag lot, at which time the need for a Special Permit for filling was brought to his attention.

Public Meeting – Phased Growth

In accordance with Section 14 of the Zoning Bylaw, this project is subject to the Phased Growth regulations of the Town of Amherst. Prior to voting on whether to approve the application or not, the Board used the Phased Growth Tally Sheet to assign the application a total of minus 6 points, under Section 14.4 of the Bylaw. During their deliberations over the points on the Phased Growth Tally Sheet the Board acknowledged that the applicant would be required to place an agricultural deed restriction on the remaining land in order to receive points under Section 14.431.

The Board determined that, if it were to approve the application, a total of 50% of the units could be built in the first year and 50% in the second year. Fifty percent of 3 units equals 1.5 units. The formula outlined in Section 14.48 states that fractions of 0.5 or greater shall be rounded up. Therefore, the Board determined that 2 of the units could be built in 2006 and 1 in 2007, if the application were to be approved.

Public Meeting – Findings

Under Section 5.10 of the Zoning Bylaw, Filling of Land, the Board found that:

- 5.100 – No slope created by the filling will be in excess of the natural angle of repose of fill materials because the proposed slopes do not exceed 3 horizontal to 1 vertical which is considerably less steep than the 1 to 1 approximate natural angle of repose of fill materials.
- 5.101 – The areas of the site that contain existing fill may not be built upon within 1 year due to the schedule of the applicant, and under this section of the Bylaw would normally be required to be loamed and seeded to prevent erosion. However, the Conservation Commission requires that wetland areas and drainage pipes in the vicinity of the site be protected with erosion control measures, which are shown on the plan approved by the Board on March 23, 2006. These erosion control measures will prevent the existing fill from eroding into the

adjacent wetland and onto adjacent properties even if the existing fill is not loamed and seeded. The Board recognized the fact that the applicant proposes to construct the houses within the next three years and so did not require that the existing fill be loamed and seeded.

- 5.102 – The proposed filling will not endanger the public health or safety, will not constitute a nuisance, will not result in a detriment to the normal use of the adjacent property, will not cause significant erosion or sedimentation and will not result in traffic hazards in a residential area or physical damage on public ways because this is a small development of three homes in a residential neighborhood. The fill will be adequate enough to protect proposed foundation walls and create yards for the homeowners, but will not exceed the amount needed to accomplish those objectives. The fill will be surrounded by erosion control measures, as required by the Conservation Commission. The traffic will not increase significantly as a result of the construction of three new homes.
- 5.103 – The Board has imposed reasonable conditions on this Special Permit to limit the steepness of the proposed slopes, to require a landscape plan for each home and the Conservation Commission has imposed conditions to control erosion.
- 5.104 – The Board decided not to require a performance bond for this project because the Conservation Commission and the Building Commissioner's office will be monitoring construction and also because a condition of this Special Permit requires that the development be built according to the plans approved by the Board.

Under Sections 3.2832 and 6.3 of the Zoning Bylaw, Flag Lots, the Board found that:

6.30 and 6.31 – The proposed flag lot is not part of a Definitive Subdivision Plan.

3.2832 and 6.32 – Although Section 6.32 of the Bylaw normally requires that flag lots be at least double the minimum lot area normally required for that district (exclusive of access strip), the proposed flag lot will be 24,453 square feet, in accordance with Section 3.2832 of the Bylaw which limits the size of flag lots in Farmland Conservation Districts to no more than 30,000 square feet, exclusive of access strip.

6.33 – The access strip of the proposed flag lot has 40.59 feet of frontage along the street (exceeding the requirement for 40 feet of frontage) and is less than 400 feet long. There is no angle in the access strip greater than 45 degrees.

6.34 and 6.35 – The width of the portion of the proposed flag lot where the principal building will be located is 120 feet and can contain a building circle with a diameter of 120 feet, more than the frontage requirement.

6.36 – There are no more than three flag lots adjacent to each other at the street line.

6.37 – Access to the flag lot meets the requirements of Section 7.7 of the Bylaw, because the lot is accessed over a common driveway that will be 16 feet wide, located in an easement that is 20 feet wide. The grade of the driveway will not exceed 5% at any point. The length of the common driveway does not exceed 400 feet. The intersection of the common driveway with the road will not be less than 60 degrees. The Fire Department, in its memorandum of November 9, 2005, has noted that the access arrangement appears to be adequate for fire and EMS vehicles.

Under Section 10.38 of the Zoning Bylaw, Specific Findings, the Board found that:

10.380 and 10.381 – The proposal is suitably located in the neighborhood in which it is proposed and is compatible with existing or other uses permitted by right in the same district because there are three homes being proposed in a neighborhood that consists of modest single-family, two-family and multi-family homes in a residential district.

- 10.382 and 10.385 – The proposal would not constitute a nuisance due to air and water pollution, flood, noise, odor, dust, vibration, lights or visually offensive structures or site features and the proposal reasonably protects the adjoining premises against detrimental or offensive uses on the site because the proposed homes will be served by town sewer and water, the grading and drainage is designed to capture and direct storm drainage into the town storm drainage system, exterior lights will be downcast and will not shine on adjacent properties, the homes will be no more than 35 feet high in relation to the grade of the roadway and the grading of the fill will be gently sloped and landscaped.
- 10.383 and 10.387 – The proposal would not be a substantial inconvenience or hazard to abutters, vehicles or pedestrians and the proposal provides convenient and safe vehicular and pedestrian movement within the site, and in relation to adjacent streets, property or improvements because the common driveway will be adequately designed and constructed to allow access to the three homes via one driveway, and the driveway will be capable of handling fire and EMS equipment. The number of cars coming and going from the site will be limited to the normal amount associated with three single-family homes and there is adequate turnaround space.
- 10.384 – Adequate and appropriate facilities will be provided for the proper operation of the proposed use because the lots are ample in size, the new homes will be connected with the town sewer and water system and the drainage system has been adequately designed to handle storm water runoff from the site.
- 10.386 – The proposal ensures that it is in conformance with the Parking and Sign regulations because adequate space has been provided on each lot for the parking of two cars as required by Section 7.000 and no signs are proposed at this time.
- 10.389 – The proposal provides adequate methods of disposal and/or storage for sewage, refuse, recyclables, and other wastes because the new homes will be connected with the town sewer system, the home owners will have a contract for weekly collection of their trash and recyclables and garages are planned for the homes, so trash and recyclables can be stored there between pick-ups.
- 10.390 – The proposal ensures protection from flood hazard because the grading and drainage systems have been designed to protect the homes from flooding, and the foundations will be placed above the groundwater level.
- 10.391 – The proposal protects, to the extent feasible, unique or important natural, historic or scenic features because the potential for farming the remaining land will be maintained with an agricultural deed restriction and access to the farmable land over the common drive and Lot 3, the flag lot.
- 10.392 – The proposal provides adequate landscaping because a condition of the Special Permit requires that a landscape plan for each home be submitted to the Board for review and approval prior to installation.
- 10.393 – The proposal provides protection of adjacent properties by minimizing the intrusion of lighting because a condition of the Special Permit requires that all exterior lighting shall be downcast and shall not shine on adjacent properties.
- 10.394 – The proposal avoids, to the extent feasible, impact on steep slopes, floodplains, scenic views, grade changes and wetlands because the steep slope to the north is left untouched, there is no floodplain on the site, the scenic views will be preserved by allowing the remaining land to be farmed and thus kept open to the extent allowed by the Conservation Commission, the proposed grade changes will be gentle and will be landscaped and the wetlands have been protected by an Order of Conditions from the Conservation Commission.

10.395 – The proposal does not create disharmony with respect to terrain and to the use scale and architecture of existing buildings in the vicinity because filling on the site will be graded with gentle slopes, not to exceed 3 to 1, these slopes will be landscaped and the buildings on the site will not exceed 35 feet in height from the grade of the roadway.

10.397 – The proposal provides adequate recreational facilities, open space and amenities for the proposed use because each lot will exceed 20,000 square feet in area and flat play areas will be created around each house.

10.398 – The proposal is in harmony with the general purpose and intent of this Bylaw because it protects the health, safety and general welfare of the inhabitants of the Town of Amherst.

Public Meeting – Decision

Russ Frank MOVED to approve the application for the flag lot and for the filling, as proposed, with conditions. Barbara Ford SECONDED the motion.

For all the reasons stated above the Board VOTED unanimously to GRANT a Special Permit with conditions, as applied for by Shaul Perry, d/b/a Sunwood Builders, under Section 6.3 and Section 5.10 of the Zoning Bylaw, to create one new flag lot and to fill land, at Summer Street and Ball Lane, (Map 5A, Parcel 56, R-N/R-LD and FC Zones).

ZINA TILLONA

BARBARA FORD

RUSS FRANK

FILED THIS _____ day of _____, 2006 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2006.

NOTICE OF DECISION mailed this _____ day of _____, 2006
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2006,
in the Hampshire County Registry of Deeds.

Town of Amherst
Zoning Board of Appeals

SPECIAL PERMIT

The Amherst Zoning Board of Appeals hereby grants a Special Permit, as applied for by Shaul Perry, d/b/a Sunwood Builders, under Section 6.3 and Section 5.10 of the Zoning Bylaw, to create one new flag lot and to fill land, at Summer Street and Ball Lane, (Map 5A, Parcel 56, R-N/R-LD and FC Zones) with the following conditions:

1. The project shall be built in accordance with the plan approved by the Board on March 23, 2006.
2. Storm drainage shall be directed away from the adjacent properties.
3. The remaining land which is not to be developed, and which is not part of the two frontage lots or the one flag lot being created by the approved plan, shall be owned by one entity, either by the owner of one of the three lots in the development or by a Homeowner's Association consisting of the owner of one of the three lots.
4. The remaining land which is not to be developed shall be maintained in accordance with the Remaining Land Maintenance Agreement. The Remaining Land Maintenance Agreement shall be submitted to the Board for review and approval at a public meeting.
5. The remaining land which is not to be developed shall have an Agricultural Deed Restriction placed on it. The revised final Agricultural Deed Restriction shall be submitted to the Board for review and approval at a public meeting prior to being filed in the Registry of Deeds.
6. Access to the remaining land for farming shall be over the common driveway and Lot 3, the flag lot. If the remaining land is not owned by the owner of Lot 3 an easement shall be created and granted by the owner of Lot 3 to the owner of the remaining land to allow access for farming.
7. The common driveway shall be maintained in accordance with the Common Driveway Maintenance Agreement. The final revised Common Driveway Maintenance Agreement shall be submitted to the Board for review and approval at a public meeting.
8. If the Remaining Land Maintenance Agreement or the Common Driveway Maintenance Agreement is modified, it shall be submitted to the Board for review and approval at a public meeting.
9. A landscape plan for each lot shall be submitted to the Board for review and approval at a public meeting prior to installation of any plant materials other than grass seed sown to stabilize slopes and prevent erosion.

10. Plantings for each lot shall be installed within one year after approval by the Board of the landscape plan for that lot. All plantings shall be installed as shown on the approved plan and continuously maintained.
11. Buildings on the site shall not exceed 30 feet in height measured from the highest point of any roof or parapet to the average finished grade on the street side of the structure.
12. Exterior lighting shall be downcast and shall not shine onto adjacent properties or streets.
13. It shall be the responsibility of the applicant or subsequent owners, as appropriate, to conduct any filling of land according to best practices in terms of grading and drainage design and the control and management of erosion, so as to avoid undue erosion or sedimentation.
14. This development is subject to Section 14 of the Zoning Bylaw, Phased Growth. The Zoning Board of Appeals has determined development authorization dates as follows:

April 2006	2 units
January 2007	1 unit

ZINA TILLONA, Chair
Amherst Zoning Board of Appeals

DATE